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NOTE AND COMMENT

THE EXECUTION OF THE INSURED FOR CRIME AS A DEFENSE TO THE INSURER, THE POLICY BEING SILENT AS TO THIS CONTINGENCY.—The case of *McCue v. Northwestern Mut. Life Ins. Co.*, 167 Fed. 435, recently decided by the United States Circuit Court of Appeals, Fourth Circuit, is, as far as has been found, the fifth case to directly decide the question involved in the subject of this note and the second to hold the insurer liable. The previous cases are, *Amicable Society v. Bolland*, 4 Bligh (N. R.) 194; *Burt v. Union Cent. Life Ins. Co.*, 187 U. S. 362; and *Collins v. Metropolitan Life Ins. Co.*, 27 Pa. Super. Ct. 353, all holding that there could be no recovery; and *Collins v. Metropolitan Life Ins. Co.*, 232 Ill. 37, where the plaintiff recovered. This last case is reviewed and commented on in 6 MICH. L. REV. 489.

It is to be noted that the court in the principal case does not follow the decision in the *Burt* case. The charter of the company provided that the heirs, executors, administrators, and assigns of those insured should be members so long as they remained insured; the policy was executed and was payable in Wisconsin, and the company was a Wisconsin corporation. From these facts the court finds that the contract is strictly a Wisconsin contract and is to be construed according to Wisconsin law. We do not attempt to

discuss this feature of the case further than to remark that the construction put on this charter provision by the court below seems reasonable. The holding there was that this provision applied to heirs, etc., only in case of annuities or where insurance was taken out on the life of a third person and the one taking out such insurance should die leaving the insurance subsisting. It is with evident satisfaction that the court rejects the rule laid down by the Supreme Court in the *Burt* case.

The facts are these:—The insured took out a policy payable to his estate, which he left by will to his children. The policy, while it contained many exceptions, was silent as to death at the hands of justice. By an arrangement with the agents who solicited the insurance he paid the premiums for the first 18 months by giving his note due in six months. This note with the agent's note as collateral was sent to the state agent who remitted the amount of the premium in cash to the company. Eight days before the note became due the insured was arrested charged with the murder of his wife, and while in jail awaiting trial he paid the note to the state agent. He was subsequently tried, convicted and hanged.

The defense rested on two points:—(1) that death by the gallows was not one of the risks insured against, (2) that even if it had been expressly undertaken, still public policy would not allow the enforcement of the contract.

If the first point is completely separated from the second, there can be no doubt that the court very properly held that it was of no avail. The policy contained many exceptions, so many in fact that it is reasonable to suppose that the company expressly excepted such risks as they did not care to undertake. To strengthen this idea the court makes use of the fact that the premium note was paid while insured was in custody. The court below held that the payment in cash by the agent was payment of the premium and completed the contract. In any event it is hard to see any ground for estoppel. The insured was to be presumed innocent. And if he had been acquitted he would certainly have had an action against the company for a breach of the contract if they had attempted to cancel it.

The perplexing question is whether public policy is concerned. No court would or should enforce a contract, unless compelled by express legislative mandate, where such enforcement will tend to increase the crime of murder. The court in the principal case contends that the charter provision authorizing defendant to "make all and every insurance * * * connected with life risks," coupled with the fact that, in the absence of express stipulation, suicide while sane does not defeat a recovery in Wisconsin, is such an expression as precludes a general inquiry into the merits of the situation. It is to be remembered that in the case of *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139, the Supreme Court decides that suicide while sane is a defense to the insurer though not expressly excepted, and it follows that as far as the *Burt* case is based on the *Ritter* case, it necessarily conflicts with the Wisconsin cases. The *Ritter* case is based on the propositions, (1) that there is an implied condition in every contract of insurance that the insured

shall not voluntarily and intentionally increase the risk and (2) that such a risk if expressly assumed would be contrary to public policy as insuring a person against his wrongful act of self-destruction. The *Burt* case is based on the first above named ground and on a modification of the second, viz, that public policy will not allow the insertion of a condition which would tend to induce crime. Thus on the first proposition the court follows the *Ritter* case so we can assume that on this ground the Wisconsin court would not concur. But the second ground taken is broader than that in the *Ritter* case and it does not follow that a Wisconsin court would oppose this point. While the policy of the law opposes suicide, it is even more zealous in its opposition to murder. So we consider the question an open one in Wisconsin.

It is important, then, to determine whether or not public policy should oppose a recovery in this case. It must be remembered that at the time of the decision of *Amicable Society v. Bolland*, supra, known as the *Fauntleroy* case, forfeitures and attainder still existed in England. It is said by the court in the principal case that this fact might have controlled the decision of that case. This is also contended by the Illinois court in the *Collins* case.

The reasoning in the *Fauntleroy* case is as follows:—An express contract to pay if insured met his death at the hands of the law would be void. "Would not such a contract (if available) take away one of the restraints operating on the minds of men against the commission of crimes? namely, the interest we have in the welfare and prosperity of our connections." If such an express contract would be void, no contract to that effect can be implied.

If the court meant by its reason why an express contract would be void that by this means the deterrent effects of the law of forfeitures would be avoided, then, of course, the reasoning would no longer apply. But it cannot be doubted that an express contract would be void for other reasons. So revolting to a court of justice is the crime of murder that no contract based on the contemplation of its possible commission by one of the parties would be tolerated. Consequently, if it follows as the court contended, that an implied contract would be equally vicious, the decision of the English court is unimpeachable. The fact, however, that the contract was express would tend to show that murder was contemplated. While the allowance of a recovery in the absence of express stipulation might not be an incentive to crime if such recovery was denied whenever it appeared that the policy was taken out in contemplation of such a crime. But it is possible that if a man knew his family would be well provided for by his insurance money in case he died at the hands of the law, this fact might tend to make him more reckless in the commission of murder and possibly this is the plain meaning of the reasoning in the *Fauntleroy* case. And it appears that a love of relatives and a desire for their well being is sometimes a characteristic of an otherwise vicious man. In *Lord v. Dall*, 12 Mass. 118, one Jabez Lord, though engaged in the "immoral traffic" of slave trading had been thoughtful enough to provide his sister with insurance, which, by the way, she was

allowed to collect though Jabez met his death while engaged in his unlawful occupation.

It might here be said that the *Burt* case on this point practically follows the reasoning of the *Fauntleroy* case. And this reasoning is potent. But there is much to be said in favor of the view of the Missouri court that "in life policies the insurer has a guaranty against increasing the risk insured, by that love of life which nature has implanted in every creature." *Harper's Adm'r v. Phoenix Ins. Co.*, 19 Mo. 506. In other words, few men will play the game they have to die to win. Certainly a person desiring to mature a policy of insurance would not often commit murder and seek execution therefor to accomplish his purpose. It was contended by counsel for insurer in the *Fauntleroy* case that by committing the capital crime Fauntleroy must have intended the legal consequences of his act, but the opposing counsel argued with force that this was just what he did not look forward to and in reply to the argument that the felonious act itself annulled the contract of insurance pointed to the fact that there might have been an escape, pardon, or commutation of sentence.

This line of argument does not, however, touch the contention that one who is insured, while he does not seek death, yet does not dread it—one of its terrors, a family left unprovided for, being taken away. And it is possible that some might be restrained from committing murder if their insurance would fail.

What seems a more potent reason for denying a recovery is the first ground taken in the *Burt* case, that there is an implied obligation on the part of the insured not to tamper with the risk. As said by the court in *Sup. Com. Knights Golden Rule v. Ainsworth*, 71 Ala. 436, "it cannot be in the contemplation of the parties that the insured by his own criminal act, shall deprive the contract of its material element"—the time when death occurs. Regardless of considerations of the security of human life, the insured, a party to the contract of insurance, by the commission of a capital crime, deliberately destroys the integrity of the contract in its very essence. He makes that certain, the uncertainty of which was the foundation of the contract. Such is the ground taken in the *Ritter* case and in the *Burt* case and it seems unassailable in principle.

It must be said, however, that the majority of the state courts including Wisconsin have repudiated this doctrine as far as suicide is concerned. *Patterson v. Nat. Premium Mut. Life Ins. Co.*, 100 Wis. 118. Their theory is well expressed in the Missouri case above referred to, that "in such policies, unless it is otherwise stipulated, the insurer takes the subject insured with his flesh, blood, and passions." *Harper's Adm'r v. Phoenix Ins. Co.*, 19 Mo. 506.

F. D. S.

THE POWER OF A CORPORATION TO HOLD AND VOTE STOCK OF ANOTHER CORPORATION.—An interesting question arose a year ago when the United States District Court for the Western District of Michigan granted a temporary injunction to A. S. Bigelow, complainant, in the case of *Bigelow v.*